

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-2877-00
JAMoon

date: SEP 13 2000

to: Chief, Examination Division, Southern California District
Attention: Darlene Perez, Group Manager
Terry Culmer, Revenue Agent
FE 1828 San Bernardino

from: Southern California District Counsel, Laguna Niguel
June Y. Bass, Assistant District Counsel
Jenny A. Moon, Attorney

subject: **Advisory Opinion re Statute Extension**

Taxpayers: [REDACTED]

Tax Year Ended: December 31, [REDACTED]

Current Statute of Limitations: [REDACTED]

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103. THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION, APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR REPRESENTATIVES.

THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH JURISDICTION OVER THE CASE.

This memorandum is pursuant to your request for our advice on determining the proper party to sign a Form 872, Consent to Extend the Time to Assess Tax, with respect to the joint [REDACTED] Federal income tax return filed by [REDACTED] (" [REDACTED] ") on behalf of herself and her deceased husband, [REDACTED] (" [REDACTED] "). This advice has been coordinated with the Office of Chief Counsel, Procedural and Passthroughs/Special Industries.

FACTS¹

██████████ died on ██████████ and was survived by his wife, ██████████.

According to paragraph five of the "Last Will and Testament of ██████████," dated ██████████, ██████████ bequeathed his entire estate to his wife provided she survived him by thirty days; otherwise, his estate was bequeathed to various trusts for the benefit of other family members. Also, according to paragraph six, ██████████ nominated ██████████ as the executor; if ██████████ failed to qualify or ceased to act as the executor, ██████████'s brother was to become the executor.

On ██████████, ██████████ executed "██████████ and ██████████ Agreement No. One," (the "Trust Agreement") naming themselves as trustors, trustees, and beneficiaries of a trust ("██████████"). The Trust Agreement provided that upon the death of either of them, the surviving spouse would become the sole trustee and sole beneficiary; further, upon the surviving spouse's death, the trust corpus and accrued income would be divided into five separate trusts, one for each of the five contingent beneficiaries.

Paragraph five of the Trust Agreement granted the following rights and privileges to ██████████ as trustors:

While living and competent, the Trustors may, at any time or times by written notice filed with the Trustee, (i) amend any provision hereof to such extent as may be determined in the sole discretion of the Trustors(s); (ii) revoke this trust in whole or part; or (iii) withdraw all or any part of the trust estate; or (iv) wholly revoke the trust. After the death of either of the Trustors, this trust shall be nonmodifiable and nonrevocable. All five sub-trusts identified above shall be nonmodifiable and irrevocable.

Paragraph six of the Trust Agreement outlined the trustees'

¹ The facts stated herein are based on our conversations and the documents you submitted. We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

powers to include general powers to take all actions necessary for the management of the trust estate, such as the power to sell and loan trust property.

On [REDACTED], [REDACTED] also executed two "Assignment of Interests to Inter Vivos Trust," by which they transferred certain deeds of trust from themselves, as individuals, to themselves as trustees of a trust--presumably the [REDACTED].

For tax year [REDACTED], [REDACTED] filed a joint U.S. Individual Income Tax Return, Form 1040, for herself and her deceased husband; it appears that [REDACTED] signed her name, as well as [REDACTED]'s name, on the Form 1040. No other Form 1040 was filed by [REDACTED] for tax year [REDACTED]. Similarly, the [REDACTED] did not file a U.S. Income Tax Return for Estates and Trusts, Form 1041, for tax year [REDACTED].

On [REDACTED], the Service received a Form 56, "Notice Concerning Fiduciary Relationship," that was signed by [REDACTED] and dated [REDACTED], indicating that she was [REDACTED]'s fiduciary; attached to the Form 56 was a copy of the Trust Agreement.

[REDACTED]'s [REDACTED] Form 1040 is attached hereto as Exhibit A.

The "Last Will and Testament of [REDACTED]" is attached hereto as Exhibit B.

[REDACTED]'s death certificate is attached hereto as Exhibit C.

Form 56, and to which was attached the Trust Agreement, are attached hereto as Exhibit D.

Two "Assignments of Interests to Inter Vivos Trust," both dated [REDACTED], are attached hereto as Exhibit E.

DISCUSSION

I. Generally

I.R.C. § 6501(a) provides that, as a general rule, tax must be assessed within three years of the filing date of the return. Under I.R.C. § 6501(c)(4), a taxpayer and the Service may consent in writing to extensions of the time for making an assessment.

I.R.C. § 6061 provides that any return, statement, or

document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. The Regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service generally applies the rules governing the execution of the original returns to Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 349. For example, any corporate officer that has authority under I.R.C. § 6062 to sign the corporate income tax return also has the authority to sign a consent to extend the time to assess. Similarly, because an executor or administrator is required to file the decedent's income tax return, the said executor or administrator has authority to sign a Form 872 with respect to the decedent's return. See Rev. Rul. 83-41.

In the case at hand, in order to determine the proper party to execute a Form 872 with respect to the joint [REDACTED] Form 1040, we must first determine whether it was proper for [REDACTED] to file a joint return with her deceased husband.

II. Joint Returns

I.R.C. § 6013(a) governs the filing of joint returns by husband and wife. Generally, a husband and wife may file joint returns, with certain exceptions, including:

(2) no joint return shall be made if the husband and wife have different taxable years; except that if such taxable years begin on the same day and end on different days because of the death of either or both, then the joint return may be made with respect to the taxable year of each. The above exception shall not apply if the surviving spouse remarries before the close of the taxable year, . . . ;

(3) in the case of death of one spouse or both spouses the joint return with respect to the decedent may be made only by his executor or administrator; except that in the case of the death of one spouse the joint return may be made by the surviving spouse with respect to both himself and the decedent if no return for the taxable year has been made by the decedent, no executor or administrator has been appointed, and no executor or administrator is appointed before the last day prescribed bylaw for filing the return of the surviving spouse. If an executor or administrator of the decedent is appointed after the making of the joint return by the surviving spouse, the executor or administrator may disaffirm such joint return by making, within 1 year after the last day prescribed by law for filing the return of the surviving spouse, a

separate return for the taxable year of the decedent with respect to which the joint return was made, in which case the return made by the survivor shall constitute his separate return.

With respect to I.R.C. § 6013(a)(2) above, generally, the decedent's taxable year ends as of the date of death. See Treas. Reg. § 1.6012-3(b)(1). However, where the husband and wife have different taxable years because of one's death, the joint return is treated as if the taxable years of both spouses ended on the date of the closing of the surviving spouse's taxable year. Treas. Reg. § 1.6013-3. In the case at hand, assuming [REDACTED] did not remarry as of the close of the [REDACTED] tax year, the discrepancy in their ending dates for the [REDACTED] tax year is due solely to [REDACTED]'s death; thus, under Treas. Reg. § 1.6013-3, [REDACTED]'s [REDACTED] tax year is deemed to have expired on [REDACTED], the same date as [REDACTED], and [REDACTED] are not barred from filing a joint return for tax year [REDACTED] under I.R.C. § 6013(a)(2).

With respect to I.R.C. § 6013(a)(3) above, the general rule is that in the case of a death of one spouse (or of both spouses), the joint return with respect to the decedent may be made only by his executor or administrator²; an exception exists whereby, in the case of the death of one spouse, the surviving spouse is allowed to file a joint return if:

(1) no return is made by the decedent for the taxable year for which the joint return is made;

(2) no executor or administrator is appointed at or before the making of such joint return; and

(3) no executor or administrator is appointed before the filing due date of the surviving spouse's return.

Treas. Reg. § 1.6013-1(d)(3).³

² "Executor or administrator" means the person who is actually appointed to such office and not a person who is merely in charge of the property of the decedent. Treas. Reg. § 1.6013-4(c).

³ Treas. Reg. § 1.6013-1(d)(4) states clearly that if an executor or administrator is appointed prior to the filing of the joint return or the due date of the surviving spouse's return, the surviving spouse cannot make a joint return; the joint return, if one is to be made, must be made by both the surviving

In the case at hand, the documents you have provided to us (which are enclosed as exhibits) do not indicate whether [REDACTED] was appointed as the executor or administrator of [REDACTED]'s estate.⁴ Thus, it is unclear whether [REDACTED] filed the joint [REDACTED] Form 1040 in her capacity as an executor of [REDACTED]'s estate, or merely as the surviving spouse meeting the exception in Treas. Reg. § 1.6013-1(d)(3). Given this ambiguity, we consider several possibilities.

A. [REDACTED] was, and is, the executor

If [REDACTED] was the executor of [REDACTED]'s estate when the [REDACTED] Form 1040 was filed, and she has not been removed or replaced as the executor, the [REDACTED] Form 1040 is valid with respect to both [REDACTED]; [REDACTED], on behalf of herself and as the executor of [REDACTED]'s estate, is the proper party to execute the Form 872. This is the most likely scenario, given that [REDACTED] nominated [REDACTED] as the executor, [REDACTED] filed the Form 56 as [REDACTED]'s fiduciary, and [REDACTED] orally represented to Exam that she was the executor of [REDACTED]'s estate; furthermore, there is no reason to doubt [REDACTED]'s credibility.

In this scenario, the Form 872 should be captioned as follows:

[REDACTED] (deceased) by [REDACTED],
[REDACTED] and [REDACTED]

The signature block should read the same, and the Form 872 should be signed in like manner, as follows:

[REDACTED] (deceased) by [REDACTED],
[REDACTED]

[REDACTED]

spouse and the decedent's executor or administrator.

⁴ It is uncertain whether [REDACTED]'s will was ever probated. A LEXIS search did not produce a record of a probate proceeding for [REDACTED].

B. No executor had been appointed when the Form 1040 was filed

If no executor had been appointed prior to the filing of the [REDACTED] Form 1040, but an executor has since been appointed, the joint [REDACTED] Form 1040 is valid with respect to both [REDACTED]; [REDACTED] had authority, in her capacity as the surviving spouse satisfying the exception in Treas. Reg. § 1.6013-1(d)(3), to file jointly with her deceased husband. The Form 872 with should be signed by both the executor (on behalf of [REDACTED]) and [REDACTED] (in her individual capacity).⁵

The Form 872 should be captioned as follows:

[REDACTED] (deceased) by [name of executor or administrator], [executor or administrator], and [REDACTED]
[REDACTED]

The signature block should read the same, and the Form 872 should be signed in like manner, as follows:

[REDACTED] (deceased) by [name of executor or administrator], [executor or administrator]
[REDACTED]

C. Someone other than [REDACTED] was appointed executor

In the unlikely event that someone other than [REDACTED] had been appointed executor or administrator of [REDACTED]'s estate prior to the filing of the [REDACTED] Form 1040, the said return is not valid with respect to [REDACTED] because it does not appear that the executor or administrator had signed the return.

Thus, the [REDACTED] Form 1040 is valid with respect to [REDACTED] only, and the Form 872 should apply to [REDACTED] only. In contrast, [REDACTED] is a non-filer for tax year [REDACTED] and no

⁵ If an executor was appointed after the [REDACTED] Form 1040 had been filed, the Service has no record of the executor disaffirming the said return.

statute extension is necessary.⁶

II. Grantor Trust

An ancillary issue is whether the Service should obtain a separate Form 872 with respect to the [REDACTED].

Generally, the return of an estate or trust is filed by a fiduciary on Form 1041. See Treas. Reg. § 1.6012-3. However, the filing requirements of a trust which is, in part or in whole, treated as owned by the grantor or another person under the provisions of I.R.C. § 671 through I.R.C. § 678, inclusive, are governed by the Code and Regulations thereunder.

The grantor is deemed to be the owner of any portion of the trust in which he has certain reversionary interests in either the corpus or the income therefrom, see I.R.C. § 673, has certain powers over the beneficial interests under the trust, see I.R.C. § 674, has certain administrative powers over the trust under which the grantor can or does benefit, see I.R.C. § 675, has the power to revoke the trust or return the corpus to the grantor, see I.R.C. § 676, or has the power to distribute income to or for the benefit of the grantor or the grantor's spouse, see I.R.C. § 677. Treas. Reg. § 1.671-1(a).

Where the grantor or another person is treated as the owner of any portion of a trust, there are included in computing his tax liability those items of income, deduction, and credit against tax attributable to or included in that portion. I.R.C. § 671; Treas. Reg. § 1.671-3(a).

Treas. Reg. § 1.671-4(a) specifies the reporting requirements for a trust, a portion of which is treated as owned by the grantor or another person, while Treas. Reg. § 1.671-4(b) provides alternative reporting requirements for a trust, all of which is treated as owned by one or more grantors or other persons.⁷

In the case at hand, the Trust Agreement indicates that the [REDACTED] is a grantor trust, all of which is deemed to be owned by [REDACTED], as trustees,

⁶ If you discover that this scenario applies to this case, you may contact our office for further guidance.

⁷ A trust, all of which is treated as owned by a husband and wife who make a joint return, is considered to be owned by one grantor. Treas. Reg. § 1.671-4(b)(8).

had "absolute discretion" over the trust principal and income for their benefit; had the power to revoke the trust during their lifetime; had certain administrative powers such as the power to make loans and to convey the trust corpus or income for inadequate consideration (per "First Amendment to [REDACTED] and [REDACTED] Agreement No. One," dated [REDACTED]).

For a grantor trust, the statute of limitations for assessment is controlled at the individual level. See Lardas v. Commissioner, 99 T.C. 490 (1992); Olson v. Commissioner, T.C. Memo. 1992-711. Thus, as long as the Service protects the statute of limitations applicable to [REDACTED], there is no need to obtain a separate Form 872 from the [REDACTED]. Furthermore, given that the [REDACTED] Trust did not file a trust return for [REDACTED] tax year, again, a Form 872 from the trust is not necessary.

RECOMMENDATIONS/CONCLUSIONS

As discussed above, determining the proper party to execute the Form 872 depends on whether the [REDACTED] Form 1040 was properly filed as a joint return and on confirming the identity of the executor of [REDACTED]'s estate.

Under I.R.C. § 6501(c)(4)(B), the Service should advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. You should advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

In addition, at the bottom of the Form 872, include the following statement: "In executing this Form 872, taxpayers acknowledge that they have been advised by Exam of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame, pursuant to I.R.C. § 6501(c)(4)(B)."

If you have any questions, please contact Jenny A. Moon at (949) 360-3431.